NLRB Restores Bars to Challenges to Union’s Representative Status in Voluntary Recognition and Successorship Contexts

The National Labor Relations Board (NLRB or Board) issued two 3-1 decisions, finalized August 26, addressing the protections that federal labor law affords new collective bargaining relationships between unions and employers. In this pair of decisions, the Board overruled precedent to restore immediate bars to the exercise of employee free choice, by the preferred means of a Board election, in voluntary recognition and successorship situations.

In Lamons Gasket Company, 357 NLRB No. 72 (2011), the Board addressed an employer’s voluntary recognition of a union based on a showing of support by a majority of employees. Prior to Dana Corp., 351 NLRB 434 (2007), “settled” Board law since 1966 had established a “recognition bar” blocking challenges to a union’s representative status for a “reasonable period” following voluntary recognition. In Dana Corp., a sharply divided Board imposed a “modified” recognition bar and permitted an immediate challenge to the union’s status by 30 percent of employees or a rival union. Now, in Lamons Gasket, the Board overruled Dana Corp. and once again barred challenges to a union’s representative status for a “reasonable period” following voluntary recognition. For the majority, outgoing Chair Wilma B. Liebman and Members Craig Becker and Mark Gaston Pearce reasoned that “[t]he Supreme Court recognized more than half a century ago that ‘a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.’” According to the Board, its earlier decision in Dana Corp. was “grounded on a suspicion that the employee choice which must precede any voluntary recognition is often not free and uncoerced, despite the law’s requirement that it be so the evidence now before us…demonstrates that the suspicion…was unfounded.” The Board also for the first time defined a “reasonable period” of protection in the voluntary recognition context as ranging from six months to one year, depending on the circumstances.

In UGL-UNICCO Service Company, 357 NLRB No. 76 (2011), the Board addressed the period following a change in ownership of a company with a unionized workforce. In its 2002 decision in MV Transportation, 337 NLRB 770 (2002), the Board recognized an immediate window period after a sale or merger transaction involving a unionized workplace in which the incumbent union’s status could be challenged by the new employer, 30 percent of employees, or a rival union. Now, in UGL-UNICCO Service Company, the Board overruled MV Transportation and created a modified “successor bar” doctrine by which the new bargaining relationship between an incumbent union and a successor employer is insulated from challenge for a “reasonable period” of time. In the successorship context, the Board specified that the “reasonable period” is six months if the new employer expressly adopts the existing contract; and up to a year, depending on the circumstances, if the new employer imposes new terms and conditions of employment.
Dissenting separately from both decisions, Member Brian Hayes criticized the Board majority for reflecting “a purely ideological choice, lacking any real empirical support and uninformed by agency expertise.” Moreover, Hayes wrote, because the majority decisions “failed to provide any reasoned explanation why the policies they advocate are preferable to the reasonable policies established in the precedent they now overrule[,] their holdings are not entitled to deference and should be put to strict scrutiny upon judicial review.”

Employers should be aware of these NLRB reversals and the protections they afford unions.

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